

jurisdiction;

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party;

(7) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by 47 U.S.C. § 331;

(8) The presentation is requested by the Commission or staff for the clarification or adduction of evidence, subject to the following limitations:

(i) this exemption does not apply to restricted proceedings designated for hearing;

(ii) in other restricted proceedings, any written presentation solicited upon such request or a summary of any oral presentation solicited upon such request shall promptly be served by the person making the presentation on the other parties to the proceeding. The Commission or its staff may waive the service requirement if service would be too burdensome because the parties are numerous or because the materials relating to such presentation are voluminous. If the service requirement is waived, copies of the presentation or summary shall be placed in the record of the proceeding and the Commission or its staff shall issue a public notice which states that copies of the presentation or summary are available for inspection. The Commission or its staff may determine that service or public notice would interfere with the effective conduct of an investigation and dispense with the service and public notice requirements;

(iii) if the presentation is made in a proceeding subject to permit-but-disclose requirements, disclosure must be made in accordance with the requirements of § 1.1206(d); provided, however, that the Commission or its staff may determine that disclosure would interfere with the effective conduct of an investigation and dispense with the disclosure requirement;

(iv) if the presentation is made in a proceeding subject to the sunshine or circulation period prohibition, disclosure must be made in accordance with the requirements of § 1.1206(d) or by other adequate means of notice that the Commission deems appropriate;

Note: If the Commission or its staff dispenses with the service

or notice requirement to avoid interference with an investigation, a determination will be made in the discretion of the Commission or its staff as to when and how disclosure should be made if necessary. See Amendment of Subpart H, Part I, 2 FCC Rcd 6053, 6054 ¶¶ 10-14 (1987).

(b) Ex parte presentations are permissible and need not be disclosed with respect to the following matters, unless the Commission, or the relevant Bureau of Office after consultation with the Office of General Counsel, finds by order or public notice that application of the reporting requirements of § 1.1206 would serve the public interest:

(1) a complaint proceeding in which the complaint is not served on the subject of the complaint (unless it is a formal complaint under 47 U.S.C. § 208); and

(2) notice of inquiry proceedings.

6. Section 1.1206 is amended by revising paragraphs (a)(1), (a)(2), and deleting paragraph (a)(3), redesignating paragraphs (a)(1), (a)(2), and (a)(3), as paragraphs (d)(1), (d)(2), and (d)(3), and adding new paragraphs (a), (b), and (c) to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

(a) Unless a proceeding is restricted under § 1.1208 or the presentation is exempt under § 1.1204(a) or (b), ex parte presentations in any Commission proceeding by persons outside the Commission to decision-making personnel are subject to the disclosure requirements set forth in subsection (d) of this section; provided, however, that the requirements of this subsection may be waived where confidentiality is necessary to protect persons making ex parte presentations from possible reprisal.

(b) The disclosure requirements for ex parte presentations set forth in subsection (d) of this section become applicable and remain in effect until the proceeding is no longer subject to reconsideration or judicial review:

(1) in a rulemaking, upon the filing of a petition for rulemaking, the issuance of a notice of proposed rulemaking, a rulemaking order done without notice and comment (for purposes of subsequent reconsideration or review); or

(2) in any proceeding other than a rulemaking, whenever a person becomes a party to the proceeding, as defined by § 1.1202(d).

Note: The disclosure requirements of subsection (d) of this

section are potentially applicable after a filing initiating an adjudicatory proceeding (such as the filing of an application, waiver request, request for declaratory relief, or other filing seeking affirmative relief). However, the disclosure requirements only apply to ex parte presentations. Accordingly, presentations by a sole party to a proceeding would not be subject to the disclosure requirements of subsection (d) of this section because they would not be deemed ex parte presentations under § 1.1202(b).

Examples: After the filing of an uncontested application, the applicant would be the sole party to the proceeding. The applicant would have no other party to serve with any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" as defined by § 1.1202(b) and would not have to be reported. On the other hand, in the example given, because the applicant is a party, a third person who wished to make a presentation to the Commission concerning the application would either have to serve the applicant or disclose any unserved presentations. Further, once the proceeding involved additional "parties" as defined by § 1.1202(d) (e.g., an opponent of the applicant who served the opposition on the applicant), the applicant and other parties would have to either serve the other or disclose any unserved presentations.

(c) Unless otherwise exempted under § 1.1204, presentations made by a member of Congress or his or her staff or by an agency or branch of the Federal Government or its staff, that are of substantial significance and clearly intended to affect the ultimate decision, shall be treated as ex parte presentations and placed (if oral, a written summary of the presentation shall be prepared and placed) in the record of the proceeding by Commission staff or in accordance with subsection (d).

(d) The following disclosure requirements apply:

(1) *Written presentations.* A person who makes a written ex parte presentation subject to this section shall, within three days of the presentation, submit two copies of the presentation to the Commission's secretary under separate cover for inclusion in the public record. The presentation (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that two copies have been submitted to the Secretary, and must be labeled as an ex parte presentation. If the presentation relates to more than one proceeding, two copies shall be filed for each proceeding.

(2) *Oral presentations.* A person who makes an oral ex parte presentation subject to this section shall, within three days of the presentation, submit to the Commission's Secretary, with copies to the Commissioners or Commission employees

involved, an original and one copy of a memorandum containing a concise summary of the entire content of the presentation, including the issues discussed, the positions taken, and all arguments and data presented. The memorandum (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary, and must be labeled as an ex parte presentation. If the presentation relates to more than one proceeding, two copies of the memorandum (or the original and one copy) shall be filed for each proceeding. If a Commissioner or Commission employee involved in the presentation believes that the memorandum does not adequately describe the presentation, he or she may request that the person file a supplemental memorandum or may file a memorandum for the record him- or herself.

(3) *Notice of ex parte presentations.* * * * *

Note 1: * * * *

Note 2: * * * *

8. Section 1.1208 is amended by revising paragraphs (a) and (b) and deleting paragraph (c) to read as follows:

§ 1.1208 Restricted proceedings.

(a) Ex parte presentations (except those which are exempt under § 1.1204) to or from decision-making personnel are prohibited:

(1) in any Commission proceeding in which there has been release of an order designating an evidentiary hearing before an administrative law judge or the full Commission. Persons having knowledge that, in a particular proceeding, a hearing designation order, show cause order, or other order designating a hearing is in preparation are prohibited from making or receiving ex parte presentations from the time they acquire such knowledge;

(2) in any proceeding in which there has issued a public notice indicating the filing of mutually exclusive applications which are not subject to selection by auction or lottery. Persons initiating a presentation who have knowledge that mutually exclusive applications have been filed prior to the release of a public notice are prohibited from making or receiving ex parte presentations from the time they acquire such knowledge; and

(3) in any Commission proceeding in which the Commission, or relevant Bureau of Office after consultation with the Office of General Counsel, determines that such ex parte presentations should be prohibited.

(b) Ex parte presentations are prohibited until the proceeding is no longer subject to reconsideration or judicial review.

§ 1.1210 Prohibition on solicitation of presentations. * * * *

9. Section 1.1212 is amended by revising paragraphs (a) through (h) to read as follows:

§ 1.1212 Procedures for handling of prohibited ex parte presentations.

(a) Commission personnel who believe that an oral presentation which is being made to them or is about to be made to them is prohibited shall promptly advise the person initiating the presentation that it is prohibited and shall terminate the discussion.

(b) Commission personnel who receive oral ex parte presentations which they believe are prohibited shall forward to the Office of General Counsel a statement containing the following information:

- (1) The name of the proceeding.
- (2) The name and address of the person making the presentation and that person's relationship (if any) to the parties to the proceeding.
- (3) The date and time of the presentation, its duration, and the circumstances under which it was made.
- (4) A brief summary of the substance of the presentation.
- (5) Whether the person making the presentation persisted in doing so after being advised that the presentation was prohibited.
- (6) The date and time that the statement was prepared.

(c) Commission personnel who receive written ex parte presentations which they believe are prohibited shall forward them to the Office of General Counsel. If the circumstances in which the presentation was made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Office of General Counsel with the presentation.

(d) Prohibited written ex parte presentations and all documentation relating to prohibited written and oral ex parte presentations shall be placed in a public file which shall be associated with but not made part of the record of the proceeding

to which the presentations pertain. Such materials may be considered in determining the merits of a restricted proceeding only if they are made part of the record.

(e) If the General Counsel determines that an ex parte presentation is prohibited by this subpart, he or she shall notify the parties to the proceeding that a prohibited ex parte presentation has occurred and, if the public interest so requires, shall serve on the parties copies of the presentation (if written) and any statements describing the circumstances of the presentation. Service by the General Counsel shall not be deemed to cure any violation of the rules against prohibited ex parte presentations.

(f) If the General counsel determines that service on the parties would be unduly burdensome because the parties to the proceeding are numerous, he or she may issue a public notice in lieu of service. The public notice shall state that a prohibited presentation has been made and may also state that the presentation and related materials are available for public inspection.

(g) The General Counsel shall forward a copy of any statement describing the circumstances in which the prohibited ex parte presentation was made to the person who made the presentation. Within ten days thereafter, the person who made the presentation may file with the Office of General Counsel a sworn declaration regarding the presentation and the circumstances in which it was made. The General Counsel may serve copies of the sworn declaration on the parties to the proceeding.

(h) Where a restricted proceeding precipitates a substantial amount of correspondence from the general public, the above procedures will not be followed with respect to such correspondence. The correspondence will be placed in a public file and be made available for inspection.

10. Section 1.1214 is amended to read as follows:

§ 1.1214 Disclosure of information concerning violations of this subpart.

(a) Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.

(b) Any person who believes that his or her own intended action may be in violation of this subpart shall consult with the Office of General Counsel before taking the action.

11. Section 1.1216 is amended by revising paragraph (a) and deleting paragraph (d) to read as follows:

§ 1.1216 Sanctions.

(a) *Parties.* Upon notice and hearing, any party to a proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to report the facts and circumstances concerning any such violation as required by this subpart, may be disqualified from further participation in that proceeding. In proceedings other than a rulemaking, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate may also be imposed.

(b) *Commission personnel.* Commission personnel who violate provisions of this subpart shall be subject to disciplinary or other remedial action as provided in 47 C.F.R. § 19.735-107.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances shall be imposed upon other persons who violate the provisions of this subpart.

February 7, 1995

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: IN THE MATTER OF AMENDMENT OF 47 C.F.R. SECTION 1.1200 *ET SEQ.*
CONCERNING EX PARTE PRESENTATIONS IN COMMISSION PROCEEDINGS

In this Notice of Proposed Rulemaking, the Commission seeks comments on significant modifications to the Commission's Ex Parte Rules. Simplification and certainty in these rules will make it easier for the Commission to function in a fair and efficient manner regarding matters under consideration. Notwithstanding the effort to streamline the Ex Parte Rules by generally adopting the Administrative Procedural Act provisions on Ex Parte communications (5 U.S.C. Section 557(d)), multiple classifications and exceptions exist in the proposed modifications to the rules that I am concerned that confusion regarding compliance with the rules may continue. I look forward to comments that address how the Commission can further modify its Ex Parte Rules such that the Commission can effectively and efficiently conduct its business, without the weight of complexity inherent in the Ex Parte Rules which may inhibit dialogue regarding the issues pending before the Commission.